Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HENRY C. HIGGINS, PETITIONER

v.

DEPARTMENT OF AIR FORCE,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL APPENDIX

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DOCKET NUMBER PH-0752-03-03 05-I-1
UNITED STATES OF AMERICA MERIT
SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

HENRY C. HIGGINS,
Appellant,
v.
DEPARTMENT OF THE AIR FORCE,

DATE: January 29, 2004 Agency.

Darryl K. Fountain, Esquire, Wilmington, Delaware, for the appellant.
Captain Lisa D. Fill, Esquire, Dover AFB, Delaware, for the agency.
Major John B. Flood, Esquire, Arlington, Virginia, for the agency.

BEFORE Michael T. Rudisill Administrative Judge

INITIAL DECISION

On June 30, 2003, the appellant timely filed an appeal of the agency action removing him from the position of Assistant Chief of Operations, GS-10, effective June 7, 2003. The Merit Systems Protection Board (Board) has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511-7513. The appellant requested a hearing which was conducted on December 15 & 16, 2003. For the reasons set forth below, the agency action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was employed by the agency as a Assistant Chief of Operations at the Dover Air Force Base (AFB) Fire Department, Dover, Delaware. By notice dated March 19, 2003, the agency informed the appellant that it proposed to remove him from federal employment for wanton disregard of operational directives and failure to follow procedures. See Appeal File (AF), Tab 3, Subtab 4r. These charges were based on the appellant's alleged disregard of fire fighting procedures during two separate off-base mutual aid calls, as well as on his failure to follow proper leave requesting procedures. On June 6, 2003, the deciding official sustained the appellant's removal. See id., Subtab 4e. This appeal followed.

General legal standards

To sustain an adverse action before the Board, an agency must establish by preponderant evidence that there is a factual basis for the charged conduct and that disciplinary action, based on the proven conduct, promotes the efficiency of the service. See 5 U.S.C. § 7513(a) and 7701(c)(1)(B); see also Burroughs v. Department of the Army, 918 F.2d 170, 172 (Fed. Cir. 1990). Preponderant evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support the conclusion that the matter asserted is more likely to be true than untrue. See 5 C.F.R. § 1201.56(c)(2) (2003). With respect to any affirmative defenses, an appellant bears the burden of proof by preponderant evidence. See 5 U.S.C. § 7701 (c)(2); 5 C.F.R. § 1201.56(a)(2) (2003). Thus, in this case, the appellant has the burden

of establishing his claims of race and reprisal discrimination by preponderant evidence.

The charges

Specifically, the agency charged the appellant as follows:

On 21 and 22 January 2003, when responding to two (2) separate mutual aid responses, you (as Assistant Chief of Operations, A-Shift) failed to follow proper directives and procedures in accordance with (IAW) Fire and Emergency Services Standard Operating Instruction (SOI) 32-2001-02, 2.2 Risk Management, Fire and Emergency Services SOI 32-2002-06, 6.1, Incident Command System (ICS), Fire and Emergency Services SOI 32-2001-06, 6.2.2, Structure Fires, and Fire and Emergency Services SOI 32-2001-06, 6.2.14 Mutual Aid Responses/Off Base Response.

The first mutual aid response was initiated on 21 January 2003 at 1842 hours requesting assistance at the General's Green apartment complex. At 1846 hours, the Dover AFB Rescue 8 (Rescue 8) crew arrived at the General's Green apartment complex. At 1847 hours, you told Rescue 8 to "Keep your crew together until Dover Chief appears on scene; maintain your vehicles unless he needs us." Basically, you told your crews to stay with their trucks until the Robbins Hose Company of Dover, De. arrived on the scene. At 1849 hours after asking the status on the whereabouts of Robbins Hose Company, you told the Rescue 8 crew to "go ahead and proceed inside," keeping the crew idle for two crucial minutes and preventing them from going into the building to investigate the alarm. Additionally, upon your arrival

at the scene you did not assume command as the Incident Commander (IC) IAW ICS procedures and Risk Management Plan. You did not set up supply or attack lines IAW the SOIs Risk Management Plan and Structure Fires. You told the Dover AFB Engine 9 (Engine 9) crew to reposition their truck by a fire hydrant when Engine 9 had in fact followed proper procedure by initially positioning the truck by the building entrance IAW SOIs. You did not utilize the off-base 800 Megahertz (MhZ) radio thus hindering emergency communication with the Robbins Hose Company. Upon return to the station after the response, you called the Crew Chief of Rescue 8, SSG Grieve, to your office and told him not to set up lighting in the future unless directed by you. Not setting up lighting and allowing crews to work in the dark is in violation of International Fire Training Association (IFSTA) training, which you received and are certified in, and is basic, common sense ground safety practice to reduce the risk safety of the crews. Your actions during this incident risked a fire spreading; put occupants inside the complex at risk; and disregarded the safety of your own firefighters and others responding to the incident....

The second mutual aid response was initiated 22 January 2003 at 0311 hours. As Assistant Chief of Operations, A-Shift, you took command of this incident; however, you again put lives at risk by not following SOIs and procedures. At 0319 hours you stated to the Rescue 8 vehicle crew "I guess since nobody is here you can go ahead on, make entry and investigate." Then, when the Rescue 8 crew responded within seconds, stating they spoke to the complex manager and the manager thought it was vandalism that set off the fire

alarm, you told your crews "stand by for LE, stand by for law enforcement to get on the scene then." From your arrival on the scene at 0318 hours until the Robbins Hose Company responded and took action, you did not have your team do anything to investigate the building for a fire, fire alarm malfunction, or validate vandalism. The Robbins Hose Company arrived on the scene at 0321 hours and went directly into the facility to investigate the alarm. Three (3) crucial minutes elapsed from the time of your arrival on the scene before any fire official went into the building to investigate. During this response you again did not use the 800 MhZ radio as required, which kept the responders of the Robbins Hose Company from having necessary communications from you; and you did not turn over command to the Robbins Hose Company, as required by the ICS.

On or about 25 January 2003 through 5 March 2003 you did not follow proper procedures for requesting sick leave. On 25 January 2003, following your discussion in base housing with me, you left work (between 1000 and 1200 hours). You did not return to work at the fire station, or request leave. You did not follow any procedures to request leave or inform anyone of your whereabouts on 25 January 2003. On 31 January, 5 February and 7 February 2003, you did not follow proper procedures to request unscheduled sick leave with your immediate supervisor, MSGT William Romosier. Instead, you simply left messages with the Assistant Chief (AC) on duty. TAW Fire and Emergency Services SOT 32-2001-02, 2.12 Leave Procedures, Assistant Chiefs' leave will be approved by the deputy fire chief or the chief when the deputy is absent. On several occasions, MSGT Romosier called your home and left messages on

your answering machine to call him back in regard to your leave status. In addition to your being familiar with the leave procedure SOI, on 13 February 2002, TSGT McVaugh, acting Deputy Chief, Fire and Emergency Services, counseled you on your failure to properly request leave when you left the fire station on 5 February 2002 without obtaining approval for leave first. Even though you told TSGT McVaugh that you would adhere to the proper procedures in the future, you did not return any of MSGT Romosier's phone calls to your residence when you were absent. On 21 February 2003, you stopped by the fire station and dropped off a doctor's excusal note covering your absences for the period of 21-28 February 2003 to Senior Airmen Martel in the dispatch center. Even though your supervisor, MSGT Romosier, was on duty in the fire station at that time, you did not follow procedures and request leave from him. On 3 March 2003 you came to work in the morning. Later that morning, you requested and were granted sick leave to try to get acceptable medical documentation for your unscheduled absences of 21-28 February 2003. On that day, MSGT Romosier approached you and asked you why you had not returned his phone calls. You told MSGT Romosier "I didn't return your calls because I thought you were harassing me," or words to that effect. Then, on 5 March 2003, you called into the station and merely left a message with the AC on duty that you weren't coming to work; again you did not request leave from your supervisor, MSGT Romosier, according to procedures and courtesy. As a supervisor, you are well aware of the proper procedures for requesting leave from your chain of command, and you fully understand how unscheduled absences affect

operations when someone fails to report to work as expected.

I note that in Burroughs, 918 F.2d at 172, the U.S. Court of Appeals for the Federal Circuit held that the Board may not sustain a charge where the agency fails to prove one of the elements by preponderant evidence. The court in Burroughs did not hold, however, that a charge must fail if any portion of the narrative description of the charge is not proven. See id. at 172. The Board has held that where, as here, a charge is based on separate acts of misconduct that are not dependent on each other and do not comprise a single inseparable event, each of the aspects may stand or fall individually. See Childs v. United States Postal Service, 67 M.S.P.R. 348, 355 (1995) (citing Wolak v. Department of the Army, 53 M.S.P.R. 251, 260-61 (1992). Accordingly, in the case at bar, I find that proof of one aspect of the charge is sufficient to sustain the charge. See Burroughs, 918 F.2d at 172; see also Jackson v. Department of the Navy, 52 M.S.P.R. 1, 3 (1991).

With respect to the agency's first and second narrative specifications, the following facts are essentially undisputed: At all times relevant to this appeal, the appellant was an Assistant Chief of Operations for the Dover AFB Fire Department in command of the Department's A-Shift. The firefighters under his control included the crews of Rescue 8 and Engine Company 9. Moreover, there exists between Dover AFB and the City of Dover, DE, what is called a mutual aid agreement. In a nutshell, this agreement calls for the Dover AFB Fire Department and the local civilian volunteer fire department to come, upon request, to

each others aid in the event of a fire or other emergency incident on or off post.

On January 21, 2003 at 1842 hours a mutual aid call came in to the Dover AFB Fire Department requesting assistance at the General's Green apartment complex which is located outside the bases' north gate. At 1846 hours, the Dover AFB Rescue 8 crew arrived first at the scene. Upon arrival, a member of the Rescue 8 crew began setting up portable lights to illuminate the building and the surrounding area. At 1847 hours, the appellant told Rescue 8, in essence, to stay with their truck until the Robbins Hose Company of Dover, DE, arrived on the scene. Subsequently, at 1849 hours, the appellant told the Rescue 8 crew to enter the building to investigate the alarm. In toto, two minutes elapsed from the time Rescue 8 arrived at the scene to the time the appellant allowed the crew to enter the building to investigate the call. In addition, the appellant ordered the Dover AFB Engine 9 crew to reposition their truck by a fire hydrant when Engine 9 had initially positioned itself by the building entrance. Upon return to the station after the response, the appellant called the Crew Chief of Rescue 8, SSG Grieve, into his office and told him not to set up lighting in the future unless he was directed to do so by the appellant.

A second mutual aid call to the General's Green Apartments was initiated on 22 January 2003 at 0311 hours. Again, the appellant and his A-shift personnel responded to the call. Upon his arrival at the location at 0318 hours, the appellant took command of the scene. At 0319 hours, the appellant told the Rescue 8 crew: "I guess since nobody is here you can go ahead on, make entry and investigate." In the meantime, the appellant

had evidently spoken with the apartment manager who informed him that he believed vandals pulled the fire alarm. So, just before the crew of Rescue 8 made entry, they received word from the appellant to: "stand by for LE, stand by for law enforcement to get on the scene then." The Rescue 8 crew stood down immediately and took no further action. Subsequently, at 0321 hours, the Robbins Hose Company arrived on the scene and went directly into the facility to investigate the alarm. A total of three minutes elapsed from the time of the appellant's arrival on the scene before any fire official went into the building to investigate.

What precise actions the appellant took during the two mutual aid calls to the General's Green Apartments are matters very much in dispute in this case. With respect to the first mutual aid call on January 21, 2003, the agency presented several witness who maintained that the appellant failed to take command of the scene; that he failed to utilize the 800 MhZ radio to stay in communications with the Robbins Hose Company; that he improperly told the Rescue 8 crew to stay in their truck rather than immediately investigate the situation thus wasting two minutes; that he improperly told Engine 9 to reposition itself at the nearest hydrant instead of staying directly in front of the entrance to the building in question; and finally, that he improperly instructed SSG Grieve not to set up portable lights during night-time operations without his permission.

As for the second mutual aid call on January 22, 2003, the agency presented witnesses who agreed that the appellant acted improperly when he again failed to use the 800 MhZ radio to stay in contact with the Robbins Hose Company; when he told the crew of Rescue 8 to

stand down pending the arrival of police to the scene thus wasting three minutes with no investigation of the scene or validation of the alleged vandalism; and when he failed to turn command of the scene over to the Robbins Hose Company before departing.

The appellant generally denied that he acted improperly during either of the mutual aid calls. Specifically, he asserted that the mutual aid agreement between Dover AFB and the City of Dover, DE is illegal. Next, he averred that he took command of both scenes and exercised legitimate discretion in his handling of firefighting personnel on both calls. As for the allegation that he failed to use the 800 MhZ radios to stay in communications with the Robbins Hose Company, the appellant maintained that either the radios were not working or he was not properly trained in their use.

Thus, there is conflicting testimony concerning the central issues in this appeal and it falls to me to resolve that conflict. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7)

the witness's demeanor. See Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987).

The agency presented the testimony of MSG William Adams, LT David Carey, and SSG Matthew Grieve. Each was present with the appellant during the mutual aid calls on January 21 & 22, 2003 at the General's Green Apartments. With respect to the first call, MSG Adams testified that he was along as an observer and riding with the appellant in his vehicle, Chief 2. He stated that Rescue 8 was first on the scene, then Chief 2, followed by Engine 9. According to MSG Adams, as the senior fire official on the scene, the appellant should have, but did not, take command of the scene when he arrived. In addition, MSG Adams testified that just before he and the appellant arrived on the scene in Chief 2, he heard the appellant tell the Rescue 8 crew to stay in their truck until the Dover Fire Department arrived. MSG Adams further testified that he thought the appellant's order was erroneous because it was Rescue 8's job to do the initial investigation of the scene. The appellant eventually allowed the Rescue 8 crew to enter the building, according to MSG Adams, but only after two crucial minutes were lost. Hearing Tape (HT) IA, 1B.

With respect to the use of radios, MSG Adams testified that while the appellant used the base radio to communicate with Rescue 8 and Engine 9, he did not use the 800 MhZ radio which would have enabled the civilian fire department to hear what was going on at the scene. MSG Adams testified that it was normal practice to use the 800 MhZ radios on off-base mutual aid calls so the civilian fire department would know what was going on. Id.

MSG Adams also testified that when Engine 9 arrived at the scene, it parked directly in front of the building where the fire was reported. A short time late, however, MSG Adams said he heard the appellant order the Engine 9 crew to move to a fire hydrant farther from the building. MSG Adams conceded that while the position of Engine 9 directly in front of the building was most advantageous, having the truck move to the a different location was within the appellant's discretion. Id.

Finally, MSG Adams testified that when the Robbins Hose Company arrived, he did not hear the appellant communicate with them in any fashion and he further testified that the appellant did not relinquish control of the scene to the civilians as is the norm. MSG Adams recalled other instances where the appellant had not communicated with the civilian fire department on off-base calls and he also stated that the appellant had previously told him that he did not like doing mutual aid calls. Id.

During the mutual aid call on January 22, 2003, MSG Adams said that he again went with the appellant in Chief 2 to the General's Green Apartments. MSG Adams testified that this time, the appellant did take command of the scene and then sent Rescue 8 in to investigate. But after the appellant talked with a maintenance man, MSG Adams testified that he ordered Rescue 8 to standby until police arrived on the scene. MSG Adams said he was surprised by this order because they never take a lay person's word for what might have happened at a scene. In any event, according to MSG Adams, no firefighters entered the building until the local fire department arrived and that

was three minutes after Rescue 8 had arrived on the scene. Again, MSG Adams said that crucial minutes were wasted. Id.

LT David Carey was the driver/operator of Rescue 8 during the mutual aid calls on January 21 & 22, 2003 to the General's Green Apartments. His testimony was consistent with that of MSG Adams but from the perspective of the Rescue 8 crew. LT Carey said that during the January 21 mutual aid call, Rescue 8 arrived at the scene first and as he and the crew were preparing to make entry and investigate the scene, he received word from the appellant over the base radio to stay in their truck and wait for the Dover Fire Department to show up. Also, in preparation for entering the building, LT Carey testified that one of his crew, SSG Matthew Grieve, began setting up portable lights to illuminate the scene. LT Carey added that the appellant never assumed command of the scene upon his arrival. LT Carey further testified that he and his crew were not happy that they were being held back from investigating the scene but nevertheless followed the appellant's orders. Subsequently, according to LT Carey, the appellant did allow the Rescue 8 personnel to enter the building but only after 2 to 3 minutes had been lost. HT 2A, 2B.

LT Carey also testified that later, when they were back at their station after the first call, the appellant told him that SSG Grieve should not set up lights at a scene again unless told to do so by the appellant. LT Carey stated that normal standard operating procedure for night-time operations is to set up portable lights as a safety precaution so the firefighters can see what they are doing. Finally, LT Carey said that he was so upset

by the appellant's conduct after the first call that he sent an e-mail to the Fire Chief complaining about how the appellant handled the scene. Id.

As for the January 22 mutual aid call to the General's Green Apartments, LT Carey testified that Rescue 8 again arrived first on the scene but did not set up lights because of what the appellant had said after the previous call. Initially, according to LT Carey, the appellant told Rescue 8 to make entry but that order was almost immediately withdrawn after the appellant talked to the apartment's maintenance man. LT Carey stated that the crew of Rescue 8 was then ordered back to its truck to await the arrival of police. Id.

SSG Grieve's testimony essentially reiterated that of LT Carey. He testified that it was standard procedure to set up lights during night-time operations and he shared LT Carey's concern that the appellant waited too long before allowing the Rescue 8 crew to enter the building on January 21. He also agreed that the appellant did not assume command during the first call; did not use the 800 MhZ radio on either call; and was dilatory in his actions on the both calls. HT 2B.

The appellant's rendition of the facts did not greatly vary from the agency's witnesses but the appellant steadfastly maintained that he did assume command during both the January 21 & 22 mutual aid calls. He stated that there is really nothing affirmative that the senior fire official on the scene needs to do to assume command_ Further, the appellant stated that it was well within his discretion to move fire trucks around a scene and decide when he was going to order his personnel into a building where a fire has been

reported. It is also within his discretion, according to the appellant, to determine whether portable lights are going to be set up at a scene. As for not using the 800 MhZ radio, the appellant stated that to the best of his recollection, the 800 MhZ radio was not working. But in the alternative, he added that he had not been trained properly in the use of the 800 MhZ radio and therefore did not use it. HT 113, 213.

After carefully considering the witness testimony, I find that the testimony offered by MSG Adams, LT Carey, and SSG Grieve is more credible than that offered by the appellant. I found the testimony of all three witnesses to be straightforward and candid. There is no evidence that any of the three witnesses harbors any animus for the appellant so I can discern no possible motive for them to fabricate. Nor does it appear that any of them stand to gain from the appellant's removal. Further, each of the three testified consistently with the documentary evidence of record, most specifically, the transcribed radio transmissions for the two General's Green emergency calls on the dates in question. See AF, Tab 3, Subtab 4y. Based on their testimony and the documentary evidence of record, I find that the appellant, as the first fire official on the scene on January 21, did not take command of the scene as prescribed by agency SOI. See AF, Tab 3, Subtab 4rr, Agency PHS, Exhibit 10. The appellant's argument that there is no special method by which command should be assumed belies the fact that the radio transmissions for the second call to General's Green Apartments on January 22 clearly show that the appellant specifically stated that he was taking command of the scene over the base radio. Thus, I believe that there is a prescribed method for assuming

command of an emergency scene and that the appellant knew that method but failed to follow it on January 21.

Next, I find that on both the January 21 and 22 call to General's Green Apartments, the appellant failed to use the 800 MhZ radio. MSG Adams rode with the appellant in Chief 2 on both calls and credibly testified that the appellant did not use the 800 MhZ radio. In addition, the appellant's assertions that the 800 MhZ radio was broken or that he was not properly trained to use the radio is contradicted by other evidence of record. Indeed, there is no evidence that the 800 MhZ radios were not working on the dates in question. further, the agency . provided training records showing that the appellant had, in fact, received training in the use of the 800 MhZ radio. See AF, Tab 3, Subtabs 4z, 4kk, Agency PHS, Exhibit 36. Thus, the appellant's testimony with respect to the radios is completely implausible.

I also find that the appellant violated the cited agency fire and emergency SOIs when he allowed two critical minutes to lapse before permitting the crew of Rescue 8 to enter the apartment building on January 21 to investigate the scene. I credit the testimony of MSG Adams, LT Carey, SSG Grieve, and the various other firefighters who testified at the hearing, including the appellant, that in such situations, time is of the essence and lives are at risk. I simply do not believe the appellant's argument that this was a reasonable exercise of his discretion especially since there was consistent testimony that he told the Rescue 8 personnel to stay in their trucks before he even arrived on the scene. To me, the evidence was clear that Rescue 8's primary mission is to immediately investigate the scene of an emergency call; absent a valid reason, they

had not been held back in the past and the appellant offered no credible explanation as to why he held them back on January 21.

I further find that the appellant violated the cited agency fire and emergency SOIs when he reprimanded LT Carey and SSG Grieve for setting up portable lights at the scene on January 21. There is abundant evidence in the record, both testimonial and documentary, that it is customary during night-time operations to set up portable lighting so that the firefighters can see what they are doing. See Agency PHS, Exhibits 12, 13, 14, 15. Based on that evidence, I believe that it is beyond cavil that lighting a night-time scene is the right thing to do under the circumstances. Again, the appellant offered no credible explanation as to why he did not want lights set up on the January 21 emergency call.

With respect to the appellant's repositioning of Engine 9 on January 21, based on MSG Adams' testimony, I find that the appellant reasonably exercised his discretion in repositioning the fire truck. MSG Adams testified that while the front of the building was a more advantageous position for Engine 9, having it move to a nearby fire hydrant was within the appellant's discretion and did not violate agency SOI. That aspect of the narrative specification is thus not sustained.

As for the January 22 emergency call to the General's Green Apartments, I find that the appellant violated the cited agency fire and emergency SOIs when he did not use the 800 MhZ radio to stay in contact with the civilian fire company; when he ordered Rescue 8 to stand down from investigating the scene; and when he failed to relinquish command to the senior civilian fire

official when he arrived at the scene. I base these findings on the credible testimony of MSG Adams who stated that after talking with the apartment's maintenance man who opined that he thought an alarm had been activated by vandals, the appellant inappropriately ordered the crew of Rescue 8 to standby its truck instead of ordering them to validate vandalism or fire alarm malfunction. MSG Adams testified that a lay person's word is never taken for what might of occurred at the scene of an emergency. HT 113.

I note that the subsequent actions of the senior civilian fire official when he arrived on the scene appear to support MSG Adam's testimony. Indeed, contrary to the appellant's stated view that firefighters should not go into a building where criminals may be operating but, instead, should wait for law enforcement officials to clear the scene, the senior civilian fire official did not wait for police to arrive but immediately sent his rescue crew into the apartment building to validate the maintenance man's belief about the fire alarm activation. This action, and not the appellant's action, appears to comport with the cited agency fire and emergency SOIs.

Finally, MSG Adams credibly testified that the appellant never relinquished command to the senior civilian fire official when he arrived on the scene on January 22. In fact, MSG Adams testified that he never heard the appellant communicate at all with the civilian fire department on the January 22 call. Since I have found that the appellant failed to use the 800 MhZ radio during the call and there is no evidence that he personally spoke to the senior civilian fire official at the

scene, I find that the appellant did not relinquish command to the senior civilian fire official on January 22 as prescribed in the cited agency SOIs.

I note that there was evidence indicating that the appellant did not like mutual aid calls off post and felt that the mutual aid agreement between Dover AFB and the City of Dover was illegal. This may explain the appellant's actions on January 21 and 22 and his deviation from fire and emergency SOT, but contrary to the appellant's pleas, it in no way vindicates him. Indeed, during his testimony, the appellant did not hide his disdain for mutual aid calls. He conceded that in December 2002, he told his crews that the next time they went on a mutual aid call they were going to stay in their trucks until the civilian fire department specifically requested their help. HT 1B. Further, the appellant implied that on other mutual aid responses off post, the Dover City Fire officials appeared to ignore him. MSG Adams testified that the appellant admitted to him that he did not like the off post emergency calls and other firefighters testified that the appellant's dislike of mutual aid calls as well as his low opinion of the civilian volunteer firefighters was well known in the department.

With respect to the legality of the mutual aid agreement at issue in this case, the appellant presented no compelling evidence, just bare assertions, that the agreement violated Air Force policy. I seriously doubt that the Commanding General of Dover AFB would have allowed an illegal or inappropriate agreement to exist between his installation and the City of Dover.

Thus, I am not persuaded that the appellant's actions should be excused because he believed the agreement was illegal. There is simply no record evidence to support the appellant's belief. Accordingly, I find that based on my analysis of the evidence as described above, the agency has established by preponderant evidence that the appellant disregarded operational directives and failed to follow procedures during the off post mutual aid emergency calls on January 21 & 22, 2003 and that charge is sustained.

With respect to the charge of failing to follow proper procedures for requesting sick leave, there seems to be no dispute that the appellant did not request any kind of leave when he left work on January 25, 2003. He did, however, on January 31, February 5 and 7, and March 5, 2003, notify the assistant chief on duty that he needed unscheduled sick leave. To support its charge that the appellant did not follow proper leave procedures on those, and other, occasions, the agency presented the testimony of MSGT William Romosier, formerly deputy fire chief at the Dover AFB Fire Department, as well as its written policy for requesting sick leave. According to MSGT Romosier, if an assistant fire chief such as the appellant needed to request sick leave, he had to have it approved by the deputy fire chief or the chief if the deputy was absent. MSG Romosier testified that on the dates in question, the appellant notified the assistant chief on duty that he was going to be absent but never notified him or the fire chief. HT AF, 4B. For his part, the appellant testified that he understood the leave policy to be that when he called off sick all he had to do was contact the assistant fire chief on duty to report his status. HT 213.

I note that the agency's leave requesting procedures specifically require assistant fire chiefs to have their leave approved by the deputy fire chief or, in his absence, the fire chief. See AF, Tab 3, Subtab 4uu. While the appellant seemed to aver that he was unaware of any written leave policy, he was, after all, a supervisor, so I find it hard to believe that he did not know the agency's leave policy. Both then Deputy Fire Chief Romosier and Chief Donald Striejewske testified as to the agency's leave requesting procedures and that the appellant was knowledgeable of those procedures and had, in fact, appropriately requested sick leave in the past.

Thus, I find that the agency's leave requesting procedures require assistant fire chiefs to have their leave approved by the deputy fire chief or, in his absence, the fire chief. I further find that the appellant was well aware of the leave procedures but failed to follow them on the dates in question. Accordingly, I find that the agency has established that the appellant failed to follow leave requesting procedures and that charge is sustained.

The appellant has not demonstrated his affirmative defenses of race discrimination

The appellant alleged that the agency discriminated against him because of his race. This is an affirmative defense which the appellant must establish by preponderant evidence. See 5 C.F.R. § 1201.56(a)(2)(iii) (2003). In order to establish a prima facie case of race discrimination based on disparate treatment, an appellant must show that: (1) He is a member of a protected group; (2) he was similarly situated to an

individual who was not a member of his protected group; and (3) he was treated more harshly or disparately than the individual who was not a member of the protected group. See Davis v. Department of the Navy, 67 M.S.P.R. 590, 598 (1995); Coleman v. Department of the Air Farce, 66 M.S.P.R. 498, 508 (1995), aff'd, 79 F.3d 1165 (Fed. Cir. 1996) (Table). If the appellant establishes a prima facie case of discrimination, the burden of going forward then shifts to the agency to articulate a legitimate nondiscriminatory reason for its action. See Carter v. Small Business Administration, 61 M.S.P.R. 656, 666 (1994) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 515-16, 113 S.Ct. 2742, 2751-52, 125 L.Ed.2d 407 (1993). An agency meets this burden when it introduces evidence, which taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action, regardless of whether the agency actually proves the charges. Id. Finally, the employee must show by preponderant evidence that the agency's stated reason is a mere pretext for prohibited discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25 (1973); Carter, 61 M.S.P.R. at 666 (citing Hicks, 509 U.S. at 515-16, 113 S.Ct. at 2742, 2752).

There is no dispute that the appellant's race is African-American. But his efforts to establish a prima facie case of race discrimination end there for aside from bare allegations, the appellant presented absolutely no evidence of a similarly situated employee who committed the same misconduct as him but received a more lenient punishment.

Even assuming that the appellant had established a prima facie case, I find that the agency presented legitimate nondiscriminatory reasons for its actions in this case. As stated above, there exists sufficient evidence to support a finding that the appellant failed to follow various fire and emergency SOIs and failed to follow proper leave requesting procedures. Accordingly, the evidence does not support the appellant's claim of race discrimination and must fail for lack of proof.

The appellant has not demonstrated has affirmative defense of reprisal.

The appellant alleged that the agency removed him because he had filed a prior Equal Employment Opportunity (EEO) complaints. See AF, Tab 1. In order for an appellant to prevail on a contention of illegal retaliation for engaging in protected activity, he has the burden of showing that: (1) He engaged in protected activity; (2) the accused official knew of such activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) after careful balancing of the intensity of the motive to retaliate against the gravity of the misconduct, there was a genuine nexus between the alleged retaliation and the adverse action. See Warren v. Department of the Army, 804 F.2d 654, 656-58 (Fed. Cir. 1986); Haack v. United States Postal Service, 68 M.S.P.R. 275, 282 (1995); Marsh v. United States Postal Service, 66 M.S.P.R. 47, 51 (1994).

The appellant averred, and the agency does not dispute, that he filed EEO complaints in June 2001 and January 2003. The appellant testified that he named Chief

Striejewske as the responding management official in the complaints. 1 note that both Lieutenant Colonel (LTC) Nathan Macias, the proposing official, and Colonel (COL) Robert King, the deciding official, testified at the hearing that they were aware of the appellant's EEO complaints but that it had nothing at all to do with the removal action. They further testified that they were not named in the appellant's complaints. IRT 4B, 5B. Based upon all the evidence presented, I find that the appellant engaged in protected activity. I also find that LTC Macias and COL King knew of the appellant's EEO complaints. However, I find that there is no evidence that either LTC Macias or COL King had any motive to retaliate against the appellant because of the complaints. To be sure, the results of the investigation into the appellant's misconduct were more than sufficient for LTC Macias to propose his removal notwithstanding the EEO filings. Moreover,the gravity of the appellant's misconduct was more than sufficient for COL King to decide to remove him from federal employment. Since the appellant has failed to demonstrate any motive by either LTC Macias or COL King to engage in reprisal against him, I find that the appellant's reprisal affirmative defense fails for lack of proof.

The agency's action was taken for such cause as promotes the efficiency of the service.

By virtue of 5 U.S.C. § 7513(a) (2003), the agency must demonstrate that the action taken against the appellant was for such cause as promotes the efficiency of the service. In order for the agency to prevail in this case, it must demonstrate that its proven reason for taking the adverse action against the appellant will promote the

efficiency of the service. 5 U.S.C. § 7513(a) (1997). Absent a showing of the "nexus" between the appellant's proven misconduct and the efficiency of the service, the adverse action will fail. Hatfield v. Department of the Interior, 28 M.S.P.R. 673, 675 (1985). Of course, it is axiomatic that offenses which are directly related to the essential mission of an agency, and, therefore, directly affect the agency's responsibility to perform that mission are, by their very nature, disruptive of the efficiency of the service. Here, the appellant was an Assistant Fire Chief directly responsible for directing fire fighters in their duties both on and off the installation. Based on my finding that the appellant unjustifiably failed to follow various agency fire and emergency SOIs while responding to two emergency calls, misconduct which is antithetical to his job and the agency's mission, I find that the agency appropriately imposed discipline on him for the sustained offense.

The penalty of removal was reasonable under the circumstances of this case

In a case in which the agency's charge against the appellant is sustained, the Board recognizes that it must accord proper deference to the agency's penalty selection, and will review the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. See Els v. Department of the Army, 82 M.S.P.R. 27, 32 (1999). In evaluating the penalty, the Board considers, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was

intentional or frequently repeated. See Rackers v, Department of Justice, 79 M.S.P.R. 262, 282 (1998). The Board recognizes that it must accord proper deference to the agency's primary discretion in managing its work force. Therefore, the Board's role in reviewing agency penalties is not to substitute its judgment for that of the agency. Rather, the Board's role is restricted to assuring that the agency's penalty is within the tolerable limits of reasonableness. See Douglas, 5 M.S.P.R. at 302; see also Wynne v. Department of Veterans Affairs, 75 M.S.P.R. 127, 133 (1997).

In a detailed written analysis accompanying the notice of decision, COL King, the deciding official, stated that he considered the appellant's written reply; the nature and seriousness of the offense, the appellant's job level and type of employment, the appellant's lack of a past disciplinary record, his past work record, his future ability to perform at a satisfactory level, the consistency of his selected penalty with the agency's table of penalties, the notoriety of the offense, the appellant's rehabilitative potential, alternative penalties, and other mitigating factors raised by the appellant. COL King concluded that the seriousness of the offense, the appellant's position as a supervisory firefighter and the fact that he no longer had faith in the appellant's ability to function in his position outweighed the appellant's relatively short period of service with the agency and his satisfactory, yet undistinguished record of performance. See AF, Tab 3, Subtab 4f.

At the hearing, COL King testified that he carefully considered the relevant Douglas factors. Specifically, he stated that he considered the appellant's misconduct to

be extremely serious. He further testified that the appellant had been placed on notice that he must follow the applicable fire and emergency SOl's, but still failed to do so. Additionally, COL King testified that he considered lesser punishments but found that the severity of the appellant's misconduct rendered lesser punishments ineffective. He also considered the appellant's supervisory position in the agency and his authority over subordinate firefighters. COL King testified that he had lost trust in the appellant and in his ability to perform as an assistant fire chief, and, more importantly, the appellant had lost the trust and confidence of his subordinate firefighters. Moreover, COL King testified that the appellant's misconduct had an overall detrimental effect on Dover AFB and its relationship with the City of Dover, Delaware. He indicated that he had received complaints from the city fire department about the way the appellant handled off base mutual aid calls so the appellant's misconduct had gained notoriety in the surrounding community. HT 5A, 5B.

The appellant's failure to follow agency fire and emergency SOls and leave procedures is serious misconduct. Moreover, the appellant committed this misconduct in the presence of his subordinates, local fire officials, and civilians who had left their apartments when a fire was reported. I can think of nothing more disheartening for a person who fled their home because of a reported fire than seeing the fire department arrive at the scene but sit and do nothing. By ordering his crews to stay in their trucks and not investigate the scene, the appellant wasted valuable time which could have led to a catastrophe. His actions certainly did not inspire the confidence of the civilian fire officials or local

civilians, in the Dover AFB Fire Department's ability to respond to emergency situations.

Nor do I find any significant mitigating factors that would make me conclude that a penalty short of removal is appropriate in this case even though the appellant's total length of government service and his unblemished record weigh heavy on his side of the scale. Those mitigating factors, however, in my mind, do not outweigh the seriousness of the appellant's misconduct. Accordingly, based on the evidence of record, I find that the deciding official appropriately weighed the Douglas factors in determining the agency's choice of penalty. Given the seriousness of the appellant's misconduct, coupled with the attendant circumstances, e.g., the effect on the military-civilian relationship, the impact on the appellant's ability to function as a supervisor and on the confidence of his supervisors in his ability to perform his duties, and the nature of the appellant's position, I conclude that the penalty of removal is within the range of reasonableness in this particular case.

DECISION

The agency's action is AFFIRMED.

NOTICE TO APPELLANT

This initial decision will become final on March 4. 2004, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board.

However, if this initial decision is received by

you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by reference to applicable laws, regulations, and the record.

You must file your petition with:

The Clerk of the Board Merit Systems Protection Board 1615 M Street, NW., Washington, DC 20419

A petition for review-may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-Filin-HQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party.

If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848

Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. See 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c).

In some, but not all districts you may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals for the Federal Circuit
717 Madison Place, NW. Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no

later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.